No. 21986

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELSIE HAMMAN,
Plaintiff,
vs. Civil No. 476
UNITED STATES OF AMERICA; WASHINGTON IRON WORKS, a Washington corporation; MORRISON-KNUDSON COMPANY, INC., a Delaware corporation; PERINI CORPORATION, a Massachusetts corporation; WALSH CONSTRUCTION COMPANY, INC., an Iowa corporation; and KAISER COMPANY, a Nevada corporation, jointly and severally,
Defendants.

ARLENE HARTUNG REED, Administratrix of the Estate of her deceased husband, ADAM HARTUNG,
Plaintiff,
vs. Civil No. 477
UNITED STATES OF AMERICA, et al,
Defendants.

ANNA LOYNING, Administratrix of the Estate of her deceased husband, SIDNEY A. LOYNING,
Plaintiff,
vs. Civil No. 522
UNITED STATES OF AMERICA, et al,
Defendants.

APPELLANTS' BRIEF AND APPENDIX

MARCUS, MCCROSKEY, LIBNER, REAMON, WILLIAMS & DILLEY
By: HARRY M. PHILO
LEE OVERFELT
J. H. MCALEAR
ROBERT H. WILSON,
Of Counsel
Business Address:
175 W. Apple at First
Muskegon, Michigan

AMERICAN BRIEF AND RECORD COMPANY, FIFTY MARKET AVENUE, N.W., GRAND RAPIDS, MICHIGAN 49502 — PHONE GL 8-5326

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JURISDICTION

These cases are before the Court on appeal from a final summary judgment (71) dismissing Count III of Plaintiffs' Third Amended Complaint for failure to state a cause of action under The Clayton Anti-Trust Law (38 Stat. 731 (1914)) 15 U.S.C. Sec. 15 (1958).

Each case is a suit for damages with diversity of citizenship and jurisdictional amount pleaded (3, 4, 17, 18, 31, 32).

This Court has jurisdiction to hear these appeals by the authority granted to it by Congress in 72 Stat. 348 (1958), 28 U.S.C. Sec. 1291.

QUESTIONS PRESENTED

I.

IS THE PREVENTION OF ACCIDENTAL INJURY TO THE LIVES AND MARITAL RELATIONSHIPS OF CONSTRUCTION WORKERS ONE OF THE BROAD SOCIAL BENEFITS TO SOCIETY FROM A COMPETITIVE ECONOMY?

The Lower Court did not examine this question.

Plaintiffs contend the answer should be: "Yes".

II.

IF THE ANSWER TO QUESTION I. IS "YES", IS NOT A CAUSE OF ACTION FOR TREBLE DAMAGES STATED UNDER THE ANTI-TRUST LAWS WHEN PLAINTIFFS' BILLS OF COMPLAINT ALLEGE:

1. ILLEGAL PRICE FIXING BY GIANT COMPETITOR DEFENDANTS TO FIX THE PRICE OF A FORTY MILLION DOLLAR GOVERNMENT CONSTRUCTION CONTRACT;

2. AN AGREEMENT AS PART OF THE PRICE FIXING TO USE A CABLEWAY WITHOUT THE SAFETY DEVICES REQUIRED BY THE GOVERNMENT CONTRACT;

3. AN AGREEMENT AS PART OF THE PRICE FIXING TO FRAUDULENTLY PROMISE JOINT AND SEVERAL PERFORMANCE;

4. THAT NOT ONLY DID THE ILLEGAL PRICE FIXING ALLOW DEFENDANTS TO WIN THE BID BY A VERY SMALL AMOUNT BUT THAT THE USE OF THE CABLEWAY WITHOUT THE SAFETY DEVICES AND THE FAILURE OF SEVERAL PERFORMANCE BY TWO OF THE DEFENDANTS WERE A DIRECT CASE OF THE DEATH OF SEVERAL CONSTRUCTION WORKERS, HUSBANDS OF PLAINTIFFS;

WHEN THE SAID DEATHS OCCURRED IN A JURISDICTION WHERE THE SPOUSES' INTEREST IN THE MARITAL RELATIONSHIP IS A PROPERTY RIGHT PROTECTED FROM INVASION?

The Lower Court said: "No".

Plaintiffs contend the answer should be: "Yes".

STATEMENT OF THE CASE

Plaintiffs' Bills of Complaint allege in Count III: (13, 27, 41)

"12. The four contractor defendants were competitors in the heavy construction field and engaged in interstate commerce in the United States.

"13. Prior to May 1, 1961, there was no contractual obligation between them in any way relating to the construction of the Yellowtail Dam.

"14. Each of the contractor defendants was capable of undertaking the construction of the Yellowtail Dam alone.

"15. That eight (8) bids by contractors engaged in interstate commerce where submitted on April 11, 1961 to the U.S. Government for the contract to construct the Yellowtail Dam.

"16. Since 1947, plaintiff had incorporeal property in the marriage partnership, a contractual and legal right recognized in the 48-101 R.C.M. 1947, 36-101 R.C.M. 1947, 36-110 R.C.M. 1947 and 36-128 R.C.M. 1947.

"17. The defendants and each of them had a duty to plaintiff to refrain from injuring said incorporeal property hereinafter referred to consortium and a particular duty to refrain from violating the Sherman Anti-Trust Law, 15 U.S.C.A., secs. 1 and 2.

"18. The defendant contractors violated the Sherman Anti-Trust Law, 15 U.S.C.A., secs. 1 and 2, on or about April 9, 10, 11, 1961 at Billings, Montana, by meeting through agents and employees and illegally fixing the price of a bid with the U.S. Government for the construction of the Yellowtail Dam in Montana.

"19. That said illegal price fixing allowed them to secure the contract with the U.S. Government at the bid price of $39,809,359.00, with the next bidder but $26,807.00 higher.

"20. That said illegal price fixing was a restraint on competition.

"21. That a breakdown of competitive conditions in the construction industry endangers construction safety and the ability of the federal government particularly to hire contractors with proper equipment and adequate programs and safety personnel.

"22. That but for said illegal price fixing, the defendant contractors would not have secured the bid and could not have injured plaintiff's property in the manner set forth in paragraph twenty-two (22) of Count I.

"23. That pursuant to the illegal conspiracy, the defendant contractors fraudulently promised the U.S. Government that they would severally perform the provisions of the contract when they intended at all times to merely perform in a joint capacity.

"24. That this act of the conspirators allowed them to reduce their bid estimate by more than $26,807.00, thereby securing the bid.

"25. That Kaiser and Walsh had previously been prohibited during the construction of the Detroit Dam by the U. S. Government from using manships to carry persomel on cableways and the failure of the conspirators to perform severally was a proximate cause of injury to the plaintiff's marriage partnership and consortium.

"26. That pursuant to the illegal conspiracy to fix the bid price, the defendant contractors intended to use the cableway in question without safety devices for transporting personnel, thereby saving several hundred thousand dollars.

"27. That pursuant to said illegal price fixing conspiracy, defendant contractors fraudulently promised the U.S. Government that they would use safe equipment when two of the co-conspirators had operated the same cableway at Greers Ferry Dam in Arkansas in violation of the government contract there, and knew that the safety devices required were lacking from the cableway and stood to profit from its purchase and sale.

"28. That this aspect of the illegal price fixing conspiracy was a proximate cause of plaintiff's injury to the marital partnership and consortium in that the death of plaintiff's decedent would not have occurred but for the absence of safety devices required on safe cableways.",

and further alleges that the aforesaid acts were the proximate cause of death of a construction worker in the course of his employment and that said construction worker was plaintiff's spouse, and that the respective marital relationships were destroyed.

There is abundant deposition testimony to support each allegation of the Bills of Complaint but there has been no trial of the cause.

The lower court, without regard to any evidentiary considerations, granted defendants' motions for summary judgment opining that a cause of action was not stated and these appeals were taken.

ARGUMENT

INDUSTRIAL SAFETY IS ONE OF THE BROAD SOCIAL BENEFITS TO SOCIETY FROM A COMPETITIVE ECONOMY AND A CAUSE OF ACTION FOR TREBLE DAMAGES UNDER THE FEDERAL ANTI-TRUST LAW IS STATED BY PLAINTIFF WIVES OF CONSTRUCTION WORKERS KILLED IN A JURISDICTION PROTECTING MARITAL PARTNERSHIP FROM INVASION IN A BILL OF COMPLAINT WHICH ALLEGES:

1. ILLEGAL PRICE FIXING BY GIANT COMPETITOR DEFENDANTS TO FIX THE PRICE OF A FORTY MILLION DOLLAR GOVERNMENT CONSTRUCTION CONTRACT;

2. AN AGREEMENT AS PART OF THE PRICE FIXING TO USE A CABLEWAY WITHOUT THE SAFETY DEVICES REQUIRED BY THE GOVERNMENT CONTRACT;

3. AN AGREEMENT AS PART OF THE PRICE FIXING TO FRAUDULENTLY PROMISE JOINT AND SEVERAL PERFORMANCE;

4. THAT NOT ONLY DID THE ILLEGAL PRICE FIXING ALLOW DEFENDANTS TO WIN THE BID BY A VERY SMALL AMOUNT BUT THAT THE USE OF THE CABLEWAY WITHOUT THE SAFETY DEVICES AND THE FAILURE OF SEVERAL PERFORMANCE BY TWO OF THE DEFENDANTS WERE A DIRECT CAUSE OF THE DEATH OF SEVERAL CONSTRUCTION WORKERS. HUSBANDS OF PLAINTIFFS.

A.

INTRODUCTION

This is a case of first impression anywhere.

Plaintiffs seek recovery of treble damages from the defendants alleging:

1. Illegal price fixing;
2. Plaintiffs within "target area of protection";
3. Proximate cause;
4. Acts of defendants which could potentially affect competition;
5. Damage to property of plaintiffs.

B.

RIGHT OF RECOVERY

The Clayton Anti-Trust Law provides as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damage by him sustained and the cost of the suit including a reasonable attorney fee." 38 Stat. 731 (1914), 15 U.S.C. Sec. 15 (1958).

Price fixing is contrary to a policy of competition underlying the Sherman Act and its illegality does not depend upon a showing of its unreasonableness since it is conclusively presumed to be unreasonable.

See *U.S. v. McKesson & Robbins, Inc.* (N.Y. 1958) 76 S. Ct. 937, 351 U.S. 305, 100 L.Ed. 1209; *Northern Pac. Ry. Co. v. U.S.* (Wash. 1958) 78 S.Ct. 514, 356 U.S. 1, 2 L. Ed. 545.

The machinery employed by a combination for price fixing is immaterial to a determination of illegality and whether motives are good or evil, whether price fixing is accomplished by express contract or by more subtle means, whether participants possess market control, whether amount of interstate commerce is large or small or whether agreement is to raise or lower prices is irrelevant to a determination of the illegality of a combination.

See *Sun Oil Co. v. F.T.C.* (CCA 7, 1965) 350 F^2 624 cert. den. 86 S.Ct. 559, 382 U.S. 392, 15 L.Ed. 473.

C.

PRICE FIXING OF BID, PER SE VIOLATION

It is a violation of the federal anti-trust laws for giant competitors to meet together and jointly fix the price of a bid. Price fixing is a per se violation.

> "There is no firmer rule of anti-trust law than the rule that price fixing is per se unreasonable. The rule is designed to protect price competition is ranked high in importance by those who sustain our anti-trust policy. On no anti-trust subject has the Supreme Court spoken with greater certitude or frequency. As earmark of free enterprise, high regard for price competition is both a basic part of our intellectual economic heritage and a reflection of our self-oriented materialism. Remove it, and competitive enterprise would lose much of its meaning. Eliminate the per se price fixing rule, and anti-trust policy would be nearly unrecognizable."
>
> Symposium on Price Competition and Anti-Trust Policy, 57 Northwestern University Law Review 137.

"The prices submitted in the various bids must be arrived at independently by each of the bidders; other-

wise there may be a violation of the federal anti-trust laws."

U.S. Government Contracts and Sub-Contracts, by The Joint Committee on Continuing Legal Education American Law Institute, ABA 1964.

"Avoid premarital understandings, agreements between the parents with respect to prices. . . ."

9 Anti-Trust Bulletin 231.

D.

TARGET AREA OF PROTECTION

In determining whether the injury is collateral to or proximately caused by the violation, a trilogy of cases decided by the Court of Appeals for the Ninth Circuit cases is apposite. In *Conference of Studio Unions v. Loew's, Inc.*, (CCA 9, 1951) 193 F² 51, the court held:

> "In order to state a cause of action under the anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured 'by reason' of anything forbidden in the anti-trust laws." (193 F² at 54-55)

This case was relied upon in *Karseal Corporation v. Richfield Oil Corporation*, (CCA 9, 1955) 221 F² 358. The court there stated:

> "Turning now to the cases concerning the 'target area' of proximate causation, the rule is that one who is only *incidentally* injured by a violation of the anti-trust laws, — the bystander who was hit but not aimed at, — cannot recover against the violator. (citing cases)." (221 F² at 363) (Emphasis in original)

Finally, in *Twentieth Century Fox Film Corporation v. Goldwyn,* (CCA 9, 1964) 328 F² 190, the court stated with reference to the *Karseal* opinion:

> "But in using the words 'aimed at' this court did not mean to imply that it must have been a purpose of the conspirators to injure the particular individual claiming damages. Rather, it was intended to express the view that the plaintiff must show that, whether or not then know to the conspirators, plaintiff's affected operation was actually in the area which it could reasonably be foreseen would be affected by the conspiracy." (328 F² at 220).

See also The "Injury" And Causation Elements of a Treble-Damage Anti-Trust Action, by Pollack, Aug. 1962 Reports (Vol. 21), Section of Anti-Trust Law, American Bar Association.

E.

INDUSTRIAL SAFETY IS ENDANGERED BY A BREAKDOWN OF COMPETITIVE CONDITIONS IN THE CONSTRUCTION INDUSTRY

One of the most substantial benefits from competition in a free enterprise economy is the industrial safety. It is particularly so in an inherently hazardous industry such as heavy construction. Approximately one million dollars of a forty million dollar contract such as Yellowtail Dam goes for safety, workmen's compensation and liability insurance.

Industrial safety pays and a competitive market therefore is a guarantee of a progressively lower accident frequency rate and injury severity rate. It is axiomatic that a breakdown of competitive conditions allows companies to disregard safety as markets are divided up.

See: "Safety" by Wendell Blair, Handbook of Heavy Construction, McGraw Hill (1959); "It's Time To Re-

Evaluate Our Safety Effort'' by Howard Latham, Chief of Safety Bureau of Reclamation in Constructor-Technical Journal of the Associated General Contractors of America (June, 1967) in Appendix.

The lives and marital relationships of construction workers are therefore in the ''target area'' which defines proximate causation in the anti-trust field.

If the Court were to say otherwise in the case at bar, it would be placed in the position of saying that the losing bidders had a cause of action for twelve million dollars plus, not because they were injured to that extent, but rather, that it was in the interest of society to prevent giant competitors from fixing bid prices prior to even forming partnerships or joint ventures, while denying recovery of a few hundred thousand to widows of construction workers who were killed because of the illegal price fixing specifics which allowed the defendants to not only win the bid but also to agree to fraud and unsafe performance sufficient to allow them to cut the price in an amount so as to actually win the bid.

This Court has made abundantly clear that determination of the target area is decisive not only for purposes of causation but also determinative of who gets protection.

F.

PLAINTIFFS' PROPERTY RIGHTS

> ''Intangibles, consisting of rights not related to physical things are merely relationships between persons, natural or corporate which the law recognizes by attaching to them certain sanctions enforcible in the courts. Such rights are incorporeal property.''
>
> 42 Am. Jur. 194.

See also *Curry v. McCanless*, 307 U.S. 357, 83 L.Ed. 1339, 59 S.Ct. 900; and *Transcontinental Oil Co. v. Emmerson*, 298 Ill. 394, 131 NE 645.

"Section 4 (of the Clayton Act) has a broader sweep. It provides that any person who shall be injured in his business or *property* . . . . . may sue. (Emphasis added in case)

"The majority of cases cited by the defendant do not avert to the distinction between 'business' and 'property' for the simple reason that that distinction was not in issue in those cases as it is here.

"The statute explicitly uses the words 'business or property' in the disjunctive. Congress intended this distinction to be meaningful. The word 'property' has wider scope and is more extensive than the word 'business'. Less is required to prove 'property' than to prove 'business'.

"The word 'property' is, in a sense, a conclusory term, i.e., an interest which the law protects. A determination whether the plaintiff has 1. property involves a value judgment as to whether that which plaintiff factually possesses should be legally protected. If it be decided that the rights, privileges and powers possessed by plaintiff should receive judicial sanction, that conclusion would be expressed by declaring that plaintiff possesses property."

Waldron v. British Petroleum Co., 231 F. Supp. 72, 86 (1964).

Plaintiffs since 1947 have had by statute contractual and legal incorporeal property rights in the marriage partnership in Montana.

The extent of judicial sanction to protect those rights from invasion and definition of the kind and quality of those rights is best expressed in *Dutton v. Hightower & Lubrecht Const. Co.*, 214 F. Supp. 298 (Mont., 1963) by Judge Murray sitting in a diversity case.

"The right of the wife to consortium in Montana is created and found in other sections of the Montana Code and particularly Sec. 48-101 R.C.M. 1947, which provides that marriage is a personal relation arising

out of a civil contract, and Sec. 36-101 which provides that in the marriage contract the *husband and wife contract toward each other obligations of mutual respect, fidelity and support.* In Wallace v. Wallace, 85 Mont. 492, 516, 279 P. 374, 382, 66 ALR 587, the Montana Supreme Court specifically held that '(i)n addition to support, a wife is entitled to the aid, protection, affection and society of her husband', all elements embraced within the meaning of the term 'consortium'. It is thus perfectly clear that, regardless of what rights a wife may or may not have acquired by virtue of her marriage under the common law, under the statutory law of Montana expressed in Secs. 48-101 and 36-101, R.C.M. 1947, a woman by her marriage obtains a contractual right to consortium.''

Dutton, supra, at page 300.

G.

RULES FOR SUMMARY JUDGMENT

The rules to be followed in determining when summary judgment should be granted may be summarized as follows:

1. Summary judgment is proper only where there is no genuine issue of fact or where viewing the evidence and the inferences which may be drawn therefrom in the light most favorable to the adverse party, the movant is clearly entitled to prevail as a matter of law In other words, there is then no genuine issue of a material fact.

2. All doubts as to the existence of a genuine issue as to any material fact must be resolved against the moving party.

3. An issue of fact may arise from countering inferences which are permissible from evidence accepted as true.

4. The court may not weigh evidence or resolve issues in determining a motion for summary judgment.

5. Issues of negligence are not ordinarily susceptible of summary judgment, but summary judgment may be proper on the basis of extraneous materials that do not involve any real issue of credibility and which clearly establish that there is no genuine issue of material facts as to certain controlling matters.

See *Cameron v. Vancouver Plywood Corporation,* (CCA 9, 1959) 266 F^2 535, 539; *Consolidated Electric Co. v. United States for Use of Gough Industries, Inc.,* (CCA 9, 1966) 355 F^2 437, 438; *United States for Use of Austin v. Western Elec. Co.,* (CCA 9, 1964) 337 F^2 568, 575; Wright, Federal Courts (1963) § 99; 6 Moore's Federal Practice 2584-5, para. 56.17(42).

CONCLUSION

The plaintiffs have pleaded, as persons within the target area of protection, property damage proximately caused by acts forbidden by the anti-trust laws. The factual allegations by plaintiffs must be accepted as true upon a summary judgment hearing and the lower court erred in dismissing Count III of Plaintiff's Third Amended Complaint.

RELIEF

Plaintiffs respectfully request that the judgment of the lower court be reversed and the causes returned to the District Court for trial with costs of these appeals to plaintiffs.

Respectfully submitted,

Marcus, McCroskey, Libner, Reamon, Williams & Dilley

By: Harry M. Philo

Lee Overfelt
J. H. McAlear
Robert H. Wilson,
Of Counsel

175 W. Apple at First
Muskegon, Michigan

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

(s) Harry M. Philo
Attorney

APPELLANTS' APPENDIX

32-1

Chapter 32

SAFETY

WENDELL R. BLAIR

CONTENTS

ACCIDENT RATES

Construction has become the largest industry in this country today, with approximately 365,000 or more contractors in business.

Construction has also become highly specialized; witness the large number of specialty contractors bidding for jobs at any bid letting. However, with this specialization has also come increased hazards, higher insurance rates, higher awards by the courts on claims, and greater financial losses to the contractor.

While other industries have met this challenge and taken corrective action to reduce accidents within their various industries, the records of the National Safety Council would indicate that the progress of the construction industry

along these lines has not kept up with their increase in size.

It will be noted in Table 32-1 that, where the average accident-frequency rates for all industries have steadily decreased, the accident-frequency rates for construction have increased. The same increase is also noticeable in the accident-severity rates for construction.

The contractor is no longer in a position to let the men take care of themselves in this highly hazardous industry. Since the enactment of workmen's compensation acts, or laws, by the states in the United States, the contractor has had to furnish some form of legal protection, namely, compensation insurance to protect his company against legal action for losses due to accidents occurring on the job.

Too many contractors are unaware of the influence a bad accident experience has on his bidding a job. [Emphasis added]. They are either not interested or are uninformed

as to what the extent of their liability is where it concerns the workman or the general public and tend to leave it up to their insurance carrier to be responsible for the accidents that occur, thereby leaving themselves open to a possible policing action by various city, state, or Federal enforcement agencies.

Table 32-1. Construction Injury Frequency Rates as Reported to National Safety Council

	1953	1954	1955	1956
Construction	15.68	17.29	19.33	19.10
National average	7.44	7.22	6.96	6.38

Of 40 different industries reporting accident-frequency rates annually, construction has placed thirty-sixth in each of the above years.

Source: National Safety Council, "Accident Rates."

After 20 years of experience in heavy-construction work, the Safety Department of the Construction Division of E. I. du Pont de Nemours & Company has developed facts that indicate that accidents on construction are expensive, as indicated below:

Total cost of project	$1,000,000	
Of which labor amounts to about		$500,000
Man-hours (2.50 per hour)		200,000
Accidents normal to 200,000 exposure hours at the rate of 45 per 1,000,000 exposure hours*		9
Direct cost of each major injury, medical	$500	
compensation†	250	
	$750	
Direct cost of 9 major injuries, 9 × 750		$ 6,750
Indirect cost, 4 times direct cost‡		27,000
Direct and indirect costs per $1,000,000 of construction		$33,750§

* From U.S. Bureau of Labor Statistics.

† Experience of an organization having much safety. (Industry average could more approximately be used, 128 days at $30 per week equals $540.)

‡ From National Safety Council and experience of the author.

§ Excludes costs of injuries involving lesser severity than "lost time cases."

This chapter will set forth some of the fundamental concepts of safety and the need for an accident-prevention program on either the large or small construction job. An accident-prevention program is not something that can be established as a book of rules, but rather it is a concept of a lot of people working together for a common cause, e.g., the prevention of human suffering, loss of life, damage to equipment, or injury to the public and the subsequent loss in dollars and cents.

While all safety or accident-prevention programs are basically the same, whether they are for the small home builder, the contractor that builds the large dams, or those who construct the miles of highway, the success of the program is in the administration of such a program designed for the particular job at hand.

In other chapters, detailed information has been compiled on how various operations of a construction job should be carried on, and it will be noted that *cost* has been a large factor in the planning of any stake or operation on the construction job. Therefore, the safety and well-being of the employees on the job and the general public as well should be given the same consideration by management in the direct planning of any construction job or operation.

The head of a construction organization is just as responsible for the safety of his personnel as he is for the ultimate finished job and the profits that will be derived from that job. In recent years great strides have been made in the technical skill and job methods used by contractors generally, but they have failed to apply these

abilities to the reduction of accidents as borne out by the consistently high number of construction accidents reported each year.

Safety is a management responsibility, and the paying of an insurance premium does not relieve that responsibility, either from a moral or a financial standpoint.

INSURANCE

Workmen's Compensation. The average contractor does not realize the influence that a bad accident experience can have in bidding a job. Too many contractors feel that their insurance costs are too high, because it is something that is required by law, and therefore take the "head in the sand" attitude of doing nothing about it, primarily because they do not realize that this cost can be materially reduced by maintaining an effective accident-prevention program that will keep the accidents on their jobs at a minimum. [Emphasis added].

Under the various acts or laws covering workmen's compensation in most states, the commissioner or director of insurance sets what are known as manual rates on all the

various job classifications, such as carpenters, welders, masons, etc.

Practically all states have an experience-rating plan that is applicable to contractors carrying on operations within the state. Through this plan, a contractor who has an effective safety program and a low accident experience can receive benefits of a certain reduction below the established manual rate—a *credit* rating—while those contractors who do nothing toward reducing the accidents that are occurring to their employees would subsequently pay an increased premium above the manual rate—a *debit* rating; there are known instances where this rate has equaled double the manual rate.

Once a contractor qualifies for the experience-rating plan, this qualification is his established rating plan and must be used by all insurance carriers that carry his coverage, thereby eliminating the possibility of a contractor trying to get a better rating as a cover up for a bad accident experience by changing insurance carriers. The contractor with a bad debit rating has no alternative but to take corrective action to reduce the accidents that are occurring to men in his employ.

Public Liability and Property Damage. The contractor buying insurance should have the expert council of an agent or insurance carrier who will explain the different types of coverages that are best fitted to the specific types of work he will be performing. In this way, he will be assured of getting the best rates applicable to the hazards of the job.

Cost and Savings. In all bidding, insurance costs and accident experience are a major factor when considering qualified contractors. Job bids can be won or lost as a result of a contractor's insurance costs based on accident experience. On a million-dollar job, the compensation insurance costs can vary from $5,000 to $15,000; on one job ($6,500,000) the difference in the compensation insurance premium based on the estimated payroll between the low and high bidder amounted to $60,000, or a difference of 28 per cent credit and a 27 per cent debit rating. These savings have been the difference between a profit and loss on numerous large jobs. One contractor reports that when

he had finished a large public garage his profit had decreased to such a point that it was hardly noticeable, but when he was presented a check for $45,000 as a return premium by his insurance carrier, it was the best profit he had ever realized; all because of an exceptionally good accident-prevention program.

Hidden Costs of Accidents. From job to job, the hidden costs and accidents will vary greatly, depending upon the type of operation, the locality, and the time of year. In analyzing the costs of accidents, the contractor must take into consideration the following factors:

1. *Downtime of men and equipment*
2. *Interference with operations*
3. *Spoiled work, damage to equipment, cost of replacement*
4. *Effect of accidents on the workmen, because of sympathy for the injured man*
5. *Investigation time by company personnel*
6. *Incidental factors: reputation, obtaining and hiring of new employees, etc.* [Emphasis added].

32-4 GENERAL

In the above list of items there is no mention of the cost of insurance premiums or the medical or compensation costs because those figures are considered actual costs as the result of any accident.

Were the contractor to take the above list and place the total cost of all items against the actual accident costs of any accident, he would find that the proportion would be approximately 6 to 1 hidden costs over actual costs. In past years the proportion was 4 to 1, but as previously mentioned, with increased wages, increased cost of equipment, increased compensation payments and higher awards by the courts, the totals now assume the higher figures.

PLANNING FOR SAFETY

Ninety-eight per cent of all accidents are preventable, and the contractor should assume his responsibility of see-

ing that the work place is as safe as is humanly possible. [Emphasis added].

During the planning stages of every job, any serious hazards that may be noticed should be brought to the attention of the contractor and his supervisory staff, with suggested safe ways of performing such hazardous operations.

Safety should be a definite part of any policies that may be established for the job, because safety effort can succeed only if those with final authority really want to reduce the number of accidents that might occur.

* * *

(Technical Publication Monthly of Associated General Contractors of America)

IT'S TIME TO RE-EVALUATE OUR SAFETY EFFORT

*by Howard S. Latham**

I'M MOST appreciative to have this opportunity to discuss safety in the construction industry. Reclamation is responsible for the administration of a public works program involving an expenditure of 300 million dollars annually for development of water resources and hydropower for the West. We are proud of the fact that almost 100 per cent of this construction is performed by private contractors on a competitive bid basis; also that approximately 90 per cent of the costs of the projects built by Reclamation are repaid to the Federal Government, most with interest.

---

* *Mr. Latham is chief safety engineer, Bureau of Reclamation, U. S. Department of Interior. These remarks were made at the J. D. Marshall Training Conference of AGC last month.*

As a result of this close relationship with the contractors and the associations representing them, we share many of the problems as well as the public criticism and indictments which are often leveled against the industry. A persistent criticism of the construction industry has been its poor accident record. Year after year the industry suffers one of the highest injury rates, claiming an average of 2,600 lives and contributing to over 200,000 disabling injuries annually.

Inroads in Profits

I know you must be concerned with this problem which plagues the industry and causes embarrassment. You are certainly aware of the inroads made on profits by reason of the direct cost of workmen's compensation insurance, the loss of equipment and material, unscheduled delays, together with the loss of production and efficiency. *With the full realization of the fact that the increased expense resulting from poor safety records is passed on to the owner in increased building costs, reflected in higher bids—Reclamation is concerned.* [Emphasis added].

Compounding this is the increasing number of tort claims being brought against the Government on the allegation that the Federal Agencies failed to provide a safe work environment and were negligent in the enforcement of safety standards. As a result, we're both being "tarred with the same brush"—economically and reputation-wise.

You doubt it? Let me quote a passage from the current edition of the *Lawyers Desk Reference,* authored by Dean Robb and Harry Philo, both prominent and influential claims attorneys: "Construction safety in the United States today is almost wholly dependent upon the philosophy, competence and will of the safety personnel of the United States Army Corps of Engineers and the Bureau of Reclamation. The Northwest Division of the Corps of Engineers, headquartered in Portland, Oregon, is the only District that appears to have all three.

Could Prevent Million Injuries

The time which the Bureau of Reclamation spends rationalizing negligent conduct could much better be spent

saving lives by insisting on Government contractors with safe equipment, competent safety personnel, and adequate safety programs, and by developing safe systems of work and safe design of machinery and eqnipment. Such an approach would probably save the lives of ten thousand workers and prevent injury to one million in the next ten years."

Obviously, that allegation is not true because Reclamation contractors are enjoying comparatively good accident records—the average accident frequency rate over the past 3 years is 13.4, which is less than half the current industry-wide average. Also, reclamation has pioneered in the establishment of progressive—and practical—construction safety standards: Bureau contractors can—and often do—attest to the aggressive efforts of our safety and inspection personnel in attempting to insure compliance with these standards.

Grossly exaggerated is the inference that Reclamation controls a preponderance of the Nation's construction, and that construction safety in the United States is largely dependent upon our philosophy, competence, and will. Reclamation's $300 million annual construction expenditure, while important, is only a fraction of the Nation's total annual construction expenditure of $50 billion plus. Likewise our average construction accident rate over the past 10 years amounted to 11 fatals and 300 disabling injuries a year. However, Robb and Philo appear to be convinced that the tail should wag the dog.

Cause for Concern

Discounting the indictment that the construction industry and those associated with it are disposed to be complacent and irresponsible in their safety efforts, there is reason to be genuinely concerned with the current accident record in the industry. And it is sobering to realize that the statistics reflect loss of life, injuries, waste, inefficiency and delay.

Let's face it—we are all involved: Contractors, labor, the owners, and Government. And, even from the most tolerant appraisal of the record, it is evident that greater emphasis must be placed upon improving the safety record

in construction. While the industry is not negligent as charged, it is evident that many of us have not worked hard enough to improve the safety record. Further, our efforts—regardless of their sincerity—have often been misdirected or ineffective.

Our immediate objective should be to stimulate new and more vigorous action at all levels toward a more constructive approach to safety in construction. The contractors and contractor associations should spearhead these efforts—since they have the means and are most affected by the success or failure of these efforts. With this in mind, I would like to share some of the concepts of effective safety management incorporated in the Bureau of Reclamation's construction program.

Primarily, we desire contractors who believe and indicate by their actions that safety is an integral part of the work—are convinced that safety is sound economy—and, as a result, take the initiative in formulating and conducting an aggressive safety program. This is based upon the premise that it is their industry, their employees, their insurance premiums, their financial gain or loss—and primarily their legal and moral responsibility.

However, there are specific provisions incorporated in all Reclamation contract specifications which we consider essential to an effective contractor safety effort. Since you are familiar with the essential criteria for an effective safety effort; I'll merely summarize them: [Emphasis added].

Establishment of a bona fide safety program embodying company policy and incorporating specific safety requirements pertaining to all work engaged in by the firm. I want to emphasize that no safety program is worth the paper it is printed on unless top management gives it full backing and line supervisors are made to understand the importance of getting workers to comply with the safety requirements.

Provision should be made for responsible and competent safety supervisor—either a career safety engineer or designation of a key supervisor—depending upon the size and nature of the job.

Provision for adequate first-aid and medical facilities, together with trained personnel to provide prompt and efficient first-aid and medical attention for injured employees. Every foreman should be required to possess either a U. S. Bureau of Mines or American Red Cross firstaid certificate.

Provision for continuing safety education at all supervisory and operational levels. This educational program must, as a minimum, provide for monthly supervisory safety meetings and weekly tool-box safety meetings conducted by the foreman and attended by every workman on the job.

Supervisor Training Needed

Probably the most pressing need is for an effective safety training program for construction supervisors—foremen and superintendents. The Associated General Contractors of America has attempted to meet this need through the development of a "Safety Training Course for Construction Supervisors." This training fills a need of long standing in the construction industry. While a commendable start has been made, I don't believe the AGC nor the contractors have tapped the full potential of this course. It is not enough to train key supervisors at chapter headquarters. This essential safety education program should be expanded and made available to all contractor supervisors including craft foremen and general foremen on all construction jobs. Reclamation is sold on the AGC course to the extent that we require every construction inspector to complete this training. To date over 900 construction inspectors have completed the course, conducted on the various jobsites.

Acceptance and compliance with established health and safety standards. These safety standards, relating to construction activity, are encountered in various forms. There are state safety orders constituting a legal obligation on the part of the contractor for compliance—and, incidentally, this obligation applies to contractors doing work for Reclamation. Several Government agencies, including Reclamation, incorporate safety standards in their contract

specifications: These represent a contractual obligation on the part of the contractor for compliance. Safety standards pertaining to construction are also available from: The United States of America Standards Institute—who are presently revising and enlarging the AIO Code covering construction—The Associated General Contractors of America, and the National Safety Council.

I'd like to make one more comment about safety standards for the construction industry. I've heard contractors gripe or complain about State and Federal agency standards—"They are too stringent, impractical, not applicable, and so forth." I've been guilty of this myself, and there is probably considerable truth in many of these complaints.

However, there is a solution to this—too seldom exercised by contractors. Contractors should take the time and expend the effort to participate in the formulation of these standards. Participation is available through contractor associations, the Construction Section of the National Safety Council, the United States of America Standards Institute, and at review hearings called by the various state industrial commissions. While such participation requires time and effort, it is essential if construction safety standards are to reflect the needs and desires of the industry. There's an old saying: "If you can't beat them, join them." I'd suggest you join.

I'd like to leave one last thought for your consideration: Let's Start by Preventing the Accidents that Kill!

In reviewing the fatalities which occurred on Reclamation construction during the past three years we found that 20 of the 24 fatal accidents resulted from the operation of construction equipment. Rubber-tired equipment, scrapers, bottom-dump and end-dump trucks were involved in 10 of these fatal accidents. Mobile cranes accounted for seven more.

Control equipment accidents, particularly truck and crane accidents, and the construction industry will be well on the way toward achieving a safety record it can live with—and afford. How?

Design. Increased consideration for the health and safety of the operator and others should be provided in the de-

sign of heavy equipment. For example, the failure of the air-braking systems contributed to 4 of the 10 fatalities which involved rubber-tired hauling equipment. Unfortunately, as you know, similar failures occur frequently throughout the industry. Dual or emergency braking systems would have prevented many of these accidents.

New Standards Under Review

Reclamation's revised construction safety standards, presently being reviewed by The Associated General Contractors of America, the Society of Automotive Engineers, equipment manufacturers and others, will require emergency braking systems on all off-highway, pneumatic-tired, earthmoving equipment having a struck capacity of 15 cubic yards or greater, manufactured after January 1, 1968. Additionally, equipment of this type, manufactured after 1965 will be required to be equipped with roll-over bars or canopies and seat belts installed in the cabs for use of the operators.

I was personally pleased with the general acceptance of these provisions as indicated by the AGC, the manufacturers of equipment and others. However, I believe that the contractors, through their contractor associations and individually, should insist on these safety features on all new equipment. The industry cannot permit safety to be optional. Today the alternative will be to face the wrath of Congress; public ridicule by the Robbs, Philos and Naders; and the censure of your own conscience.

In our evaluation of equipment design, we can't afford to overlook the problem of environmental health. I'm speaking of designing for the elimination or reduction of excessive noise, harmful dusts, and extreme temperatures. I'm personally convinced that air-conditioned cabs on heavy equipment operated in hot climates is not too far in the future. Noise abatement, achieved by relocating exhaust ports or by the installation of sound barriers or absorption material, should be undertaken now.

These improvements are necessary and are comparatively inexpensive when compared with the overall cost of equipment. Further, dollars expended in this manner will

be returned tenfold in increased production and reduced accident costs.

Maintenance. Preventive maintenance, with provision for tagging and deadlining faulty equipment, is essential to an effective safety effort. This is all too often neglected under the dangerous and uneconomical pretense of delaying production.

Operator Qualification and Training. This need is probably the most important and usually the most neglected factor in safe equipment operation. To be effective, both management and labor must participate in this program, involving provision for training new operators, checking out operators when they are hired, insuring that operators are physically qualified, together with provisions for on-the-job safety training and education.

I doubt that any of us entertain any doubt as to the need to re-evaluate our safety effort. Casual reflection will disclose how significant accident experience is in relation to the construction industry: Its effect upon our ability to achieve a quality product—on time—with optimum safety and at a profit.

I've presented a few basic safety concepts absolutely necessary to achievement of a good safety record—all requiring initiative and the expenditure of time and effort on the part of those in the industry—and all capable of achievement by any reasonably competent management. Those of us in the construction industry can reaffirm our Skill, Responsibility, and Integrity by pinpointing these concepts or objectives for accomplishment—NOW!

In order to emphasize the necessity for action. NOW, I'd like to leave you with this quote from an unknown author:

> "The Tarantula sat on the Scorpion's back,
> And he chuckled with ghoulish glee;
> Says he, 'I must lick this son-of-a-such,
> Or, by gad, he'll lick me.' "